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In re Application of
Charles Schreiber
Application No. 10/657,450
Filed: September 8, 2003
Attorney Docket No. 83336.1604

DECISION ON PETITION

This is a decision on the petition under the unavoidable provisions of 37 CFR 1.137(a), filed June 10, 2008, to revive the above-identified application.

The petition is **DISMISSED**.

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application became abandoned for failure to timely file a proper response to a final Office Action, which was mailed on October 24, 2007. The final Office Action set a three (3) month shortened statutory period for reply. An amendment was submitted on January 24, 2008. In response to the amendment an Advisory Action was mailed on May 27, 2008 indicating the amendment submitted on January 24, 2008 did not place the application in condition for allowance. Accordingly, this application became abandoned on January 25, 2008. A Notice of Abandonment was mailed on June 13, 2008.

Petitioner contends that a Request for Continued Examination (RCE) was filed in response to the Final Office Action on January 24, 2008. In support of petitioner's argument a copy of the RCE, Electronic Acknowledgement Receipt, and Fee Transmittal form. Petitioner further notes that applicant's deposit account was deducted of the RCE fee.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable within the meaning of 37 C.F.R. § 1.137(a). The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Director to have been “unavoidable.” See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term “unavoidable” is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business.”); In re Mattullah, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a “case by case basis, taking all the facts and circumstances into account.” Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

Petitioner’s argument has been considered but is not persuasive. A review of the record shows that an RCE was received on January 24, 2008. However, the RCE was directed to application No. 29/247,798. All correspondence related to a national patent application already filed with the U.S. Patent and Trademark Office must include the identification of the application number or the serial number and the filing date assigned to the application by the Office. See, 37 CFR 1.5(a). Further review shows that the RCE in addition to containing the incorrect application number, contained the incorrect filing date, docket number, art unit, first named inventor and examiner name. As such the RCE was not matched to application no. 10/657,450 because none of the required identifiers was included on the RCE submitted on January 24, 2008. It is further noted the copy of the RCE submitted on petition (which contains the correct application number and correct identifiers), is not the RCE filed on January 24, 2008. As such the failure to include any proper identifiers cannot be construed as a minor error. Nor can the failure to submit an RCE with the correct application number be construed as unavoidable delay.

A delay caused by an applicant’s lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered “unavoidable”. See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985).

Accordingly, petitioner has failed to provide any facts or evidence that warrant a finding of unavoidable delay.

If petitioner cannot provide the evidence necessary to establish unavoidable delay, or simply does not wish to, petitioner may wish to consider filing a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an “unintentionally” abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was “unavoidable.” This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR

1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$770.00 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3215.



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